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## The Influence of Comparative Procedure in the United States

Comparative law, especially the study of legal institutions and procedures, should be ranked among the most illuminating branches of legal science. When teaching a course that emphasizes comparative procedure, I remind students of the justification that was given them when they were asked to learn Latin in school: We study Latin to learn English. So with comparative law. American law students are not training to become lawyers or judges in Berlin or Paris. The purpose of comparative study is to help understand what is distinctive (and problematic) about domestic law.

Study the European civil-service judiciary, for example, and you will be forced to ask why in the Anglo-American legal systems we construct our judiciary so differently: Why do we select our judges so much later in their professional careers? Why do we recruit our judges exclusively from the ranks of practicing lawyers rather than training them as a career magistracy? Why is political partisanship still so prominent in judicial selection in the United States? Foreign example teaches you about your own system, both by helping you ask important questions, and by suggesting other ways.

Comparative procedure is, therefore, a profoundly interesting and instructive discipline. I have been asked to report to the International Association of Procedural Law on the influence of that comparative procedure in the United States. My report is short and sad: The study of comparative procedure in the United States has little following in academia, and virtually no audience in the courts or in legal policy circles.

I begin with academia. Over the last generation, American university law schools have experienced what many regard as a golden age. The prestige of the elite law schools has never been greater. The devotion of their alumni is astonishing. The law schools of Yale and Harvard are currently completing fund-raising campaigns that have

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yielded over \$100 million for each school. The competition from prospective students for admission to the leading schools is intense. The professorate has increased mightily in size and in the range of its interests. The new discipline of law-and-economics (or economic analysis of law) has achieved immense and deserved influence—in fields of law ranging from contracts, antimonopoly law and business organizations, to tort, crime, and even procedure. The other great scholarly growth industry of recent decades has been constitutional law and theory—the effort to account for and to influence the awesome expansion of federal judicial power in American life.

*Comparative law in the curriculum.* Superficially, comparative law seems secure within American law schools. If, for example, you look at the curricular offerings, comparative law appears to be decently represented. Of the twenty-five schools that were top-ranked in the 1993 national ranking of university law schools, I have obtained catalog listings for the curriculum at all but one.<sup>1</sup> Nineteen of the schools offer a basic course in comparative law or civil law, that is, a course contrasting Continental and Anglo-American law. Ten schools offer courses in international business transactions. Courses in socialist law are also common. Eight of the schools teach Chinese law and nine Russian law. I was amazed to see that half the schools (thirteen) offer at least one course in Japanese law.

Alas, these law school catalog descriptions of comparative law courses conceal a curricular Potemkin Village. What you cannot know from a mere reading of the catalogs is that virtually nobody—only a handful of students—actually takes these courses. The vast majority of American law students graduate in complete ignorance of comparative law. Thereupon they join the American legal profession, where they can remain in blissful ignorance that the rest of the civilized world disdains many of the attributes of a legal system that Americans take for granted.

Within the intellectual life of the American legal academy, comparative law is a peripheral field. Questions of comparative and foreign law seldom figure in the conversation about law and law-related subjects that comprises the common intellectual life of an American law faculty. Like a child in Victorian England, the comparativist on an American law faculty is expected to be seen but not heard. Even when scholarly inquiry concerns topics on which foreign experience is

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1. The 25 law schools in the order ranked by *U.S. News & World Report*, March 22, 1993: Yale, Harvard, Stanford, Chicago, Columbia, New York University, Michigan, Virginia, Duke, Georgetown, Pennsylvania, Berkeley, Northwestern, Cornell, Texas, Vanderbilt, UCLA, USC, Boston University, Notre Dame, George Washington, Wisconsin, Hastings, Iowa, Minnesota. The discussion of course descriptions in text is based upon the schools' 1992-93 catalogs, except for Stanford and Hastings, for which 1993-94 catalogs were used. The Boston University catalog was not located. I wish to express my gratitude to Richard Kim, Yale Law School '95, who gathered these materials for me.

deep and potentially instructive, American legal dialogue starts from the premise that no relevant insights are to be found beyond the water's edge. To be sure, the fads of Continental philosophy have their innings; the cognoscenti invoke Foucault, Derrida, and Habermas. But the lessons of the Swiss Code or the work of the German *Verfassungsgericht* are simply unknown.

*A refugee field.* The sense that comparative lawyers are outsiders was once rooted in the reality that many of the most prominent of them were emigres—Rheinstein at Chicago, Schlesinger at Cornell, Ehrenzweig and Reisenfeld at Berkeley, Kessler (and now Damaška) at Yale, Rabel and Stein at Michigan. The great generation that brought the discipline of comparative law to prominence in American law schools in the middle decades of the twentieth century was composed largely of refugees—most fleeing Hitler, a few courtesy of Mussolini and Stalin. This founding generation of European-trained scholars left few successors. Of the great figures, only Rheinstein arranged for *Schuler*, through the University of Chicago Foreign Law Program. Actually, much of the comparative law curriculum in American law schools today is not taught by regular members of the faculties. The courses are often staffed by visiting scholars from abroad, or—especially in the case of transactional-type courses—by nonacademics, that is, by practicing lawyers. Ugo Mattei, an Italian jurist who teaches both there and in the United States, captures the state of American comparative law aptly when he writes “that American academia is becoming more and more turned in upon itself and that the generation of great comparativists that was given to [the United States] by the twentieth century tragedy has yet to be replaced.”<sup>2</sup>

Why the founding generation could not perpetuate comparative law as a vibrant discipline is something of a mystery. A background factor of great importance is the weakness of foreign-language knowledge among even the most able and highly educated American lawyers. Another factor is the sense that the taxonomic orientation of the founding generation largely spent itself. This has been a problem in European comparative law circles as well: once René David<sup>3</sup> has written, once you have Zweigert & Kötz<sup>4</sup> on the shelf, there seems to be less reason to keep doing it. In the American setting one is reminded of a simultaneous phenomenon, the precipitous decline of the

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2. Mattei, “Why the Wind Changed: Intellectual Leadership in Western Law,” 42 *Am. J. Comp. L.* 195, 218 (1994).

3. René David & Camille Jauffret-Spinozi, *Les grands systèmes de droit contemporains* (10th ed. 1992); René David & John E.C. Brierley, *Major Legal Systems in the World Today* (3rd ed. 1985).

4. Konrad Zweigert & Hein Kötz, *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts* (2d ed. 1984); Konrad Zweigert & Hein Kötz, *Introduction to Comparative Law* (Tony Weir, transl. 2nd ed. 1992).

treatise-writing tradition in American legal academia. The great treatises on American private law were written in the early and middle decades of the twentieth century by leading academics at the major law schools—Corbin at Yale, Scott and Williston at Harvard, Powell at Columbia, Bogert at Chicago, Wigmore at Northwestern, Prosser at Berkeley, Palmer at Michigan. Scarcely a treatise writer can be found on any of those faculties today. There is the sense that the treatise-writer's job of organizing the law has been done, and legal scholars are not needed simply to update the enterprise. The great task that the founding generation of American comparativists set for itself was to expound the relation of common law and civil law. Like the treatise writers, they did their job so well that, at a certain level, successors appear not to have been needed.

*Comparative scholarship.* What of scholarly writing about comparative law, and in particular, about comparative procedure? The corpus of American legal-academic literature is vast. There are hundreds of law journals, mostly edited by students and subsidized as training vehicles by the law schools. Dozens of these serials purport to specialize in international law, some in international and comparative law. These journals are desperate for articles, and an intending author can publish virtually anything in one or another of them. If, therefore, you scroll through the computerized indexes, you find a steady trickle of entries on topics touching comparative procedure. Little of this literature appears in the main law journals, and you would have to strain to call much of it influential.

I must not exaggerate this point. Back across the decades there have been significant episodes in which topics of comparative law have attracted notice outside the narrow fraternity of specialists. Scholars at Columbia and Harvard sustained an important series of books and articles on Continental civil procedure in the 1950s and 1960s.<sup>5</sup> Walter Gellhorn had considerable success in the 1960s interesting American administrative law scholars in the subject of the Scandinavian ombudsman.<sup>6</sup> Deep unease about the phenomenon of nontrial disposition in American criminal procedure, so-called plea bargaining, resulted in the 1970s in a prominent literature investigating Continental practices.<sup>7</sup> The turmoil in gender relations and family structure created an appreciative audience in the 1980s for

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5. Peter E. Herzog & Martha Weser, *Civil Procedure in France* (1967); Ruth B. Ginsburg & Anders Bruzelius, *Civil Procedure in Sweden* (1965); Kaplan, von Mehren & Schaefer, "Phases of German Civil Procedure (parts 1 & 2)," 71 *Harv. L. Rev.* 1193, 1443 (1958).

6. Walter Gellhorn, *Ombudsmen and Others: Citizens' Protectors in Nine Countries* (1966).

7. Well summarized in Weigend, "Continental Cures for American Ailments: European Procedure as a Model for Law Reform," 2 *Crime & Justice* 381 (1980).

Mary Ann Glendon's work on comparative family law.<sup>8</sup> Mirjan Damaška's challenging book relating the world's legal systems to typologies of political order is an enduring achievement.<sup>9</sup> There have been other success stories in American comparative law. The field survives, but at the outer fringe of legal-academic life. If the study of comparative law were to be banned from American law schools tomorrow morning, hardly anyone would notice.

*Comparative law in the courts.* The self-referential quality of American legal academic discourse is echoed in the work of the law courts. Notice of foreign authority is virtually never taken. Alain Levasseur has written lately that "foreign law is not considered as a relevant topic for consideration" in American judicial opinions, even though in the formative period of American law in the early decades of the nineteenth century there was considerable interest in French and European law.<sup>10</sup> For the whole of the second half of the twentieth century, Levasseur was able to locate a total of 35 American state-court decisions, out of the many thousands published, in which the court made some reference to French law. (His study excluded Louisiana.) And even his minuscule figure of 35 cases overstates the real influence of French law on American thought, because many of these cases involved some conflict of laws point having French contacts, in which consideration of the French source was forced upon the American court.<sup>11</sup>

Mary Ann Glendon has drawn attention to the insularity of modern American constitutional law in her book, *Rights Talk*.<sup>12</sup> She contrasts the handling of the privacy rights of homosexuals in the leading European case, *Dudgeon v. United Kingdom*,<sup>13</sup> and the later U.S. Supreme Court case, *Bowers v. Hardwick*.<sup>14</sup> Several of the six opinions in *Dudgeon* were steeped in comparative (including American) learning. The American case, decided six years later, was badly reasoned and wholly ignorant of the European precedent. Glendon laments: "The six *Dudgeon* opinions, issued by some of the world's leading jurists, contained ideas and information that could have focussed issues, enlarged perspectives, improved the quality of reason-

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8. Mary Ann Glendon, *The Transformation of Family Law: State, Law, and Family in the United States and Western Europe* (1989); id., *The New Family and the New Property* (1981).

9. Mirjan Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (1986).

10. Levasseur, "The Use of Comparative Law by Courts," 42 *Am. J. Comp. L.* 41, 42 (1994 Supp.) (U.S. National Reports to the XIVth Congress of the International Academy of Comparative Law, Athens, Greece (1994)).

11. Id. at 57-58.

12. Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse*, ch. 6, at 145-70 (1991).

13. 3 *Eur. Human Rights Rep.* 40 (1980).

14. 478 U.S. 186 (1986).

ing, and ultimately helped to place our Court's decision—whichever way it went—on a sounder and more persuasive footing."<sup>15</sup>

To take another example, it has been striking to watch the United States Supreme Court wrestle with the problems of abortion as though pregnancy were a phenomenon unique to the United States. The abortion question became legally contentious in the 1960s and 1970s on account of medical and sociological changes that were experienced throughout the West. Elsewhere, the constitutional courts have drawn on each other's experience.<sup>16</sup> In the United States, the work of other constitutional systems goes unmentioned in our courts.<sup>17</sup>

An English writer, observing these trends, has written: "With U.S. law being argued to Strasbourg institutions, and the House of Lords referring to both U.S. and Strasbourg law, perhaps it is now the Americans who have assumed the attitude once ascribed . . . to the British: when told how things are done in another country they simply say: 'How funny.'"<sup>18</sup>

This disinterest in foreign example is peculiarly limited to American legal culture. Americans are not otherwise xenophobic. In most scholarly disciplines the Americans are appropriately observant of the leading foreign literatures. Interest in foreign example is also a staple of broader public policy discourse. For example, in the current American debate about the financing of health care and health insurance, foreign example has figured centrally in the deliberations. Yet, when legislative or policy discourse touches the law courts and the legal system, the assumption is automatic that foreign example cannot instruct us.

Consider the federal commission that devised the criminal sentencing guidelines in the 1980s. Here is a subject on which vast comparative learning was available, for Americans were latecomers to the concerns about sentencing equality that motivated the federal guidelines.<sup>19</sup> You will, however, look in vain in the official proceed-

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15. Glendon, *supra* n. 12, at 152.

16. Glendon contrasts the care with which the Canadian Supreme Court examined the American Supreme Court's abortion jurisprudence, as well as authority from the German Supreme Constitutional Court and the European Court of Human Rights. *Regina v. Morgentaler*, [1988] 1 S.C.R. 30, discussed in Glendon, *supra* n. 12, at 163-68.

17. A search of the computerized data bases located exactly one U.S. Supreme Court citation to any of the developments regarding abortion in other contemporary legal systems. Chief Justice Rehnquist's dissent in *Planned Parenthood v. Casey*, 112 S.Ct. 2791, 2855 n.1 (1992), contains a one-paragraph footnote contrasting the 1975 German and 1988 Canadian abortion cases as opposing authorities.

18. Michael, "Civil Rights: Homosexuals and Privacy," 138 *New Law J.* 831 (1988), extracted in Glendon, *supra* n. 12, at 158.

19. Weigend's careful English-language explication of the German day fine system has been studiously ignored by American writers and policy makers. Weigend, "Sentencing in West Germany," 42 *Md. L. Rev.* 37 (1983).

ings for the least indication that foreign legal systems and legal literatures might offer insight or experience relevant to the American problem.<sup>20</sup>

What accounts for the American neglect of comparative law? Why are Americans so open to foreign example on health care and so resistant to foreign example on topics of legal administration? I do not profess to have an answer that is in any sense complete, but I can point to some factors that seem germane.

*Pragmatism.* This instinctive disdain for other legal cultures derives in part from the intellectual movement known as legal realism, a movement that has, since the 1930s, strongly devalued the doctrinal integrity of American law. If you have been trained to view legal doctrine as a pack of feeble or even dishonest excuses, excuses masking the real interests and forces that underlie and explain the work of the courts, you will not have much regard for the *Bürgerliches Gesetzbuch* and for the style of legal reasoning that it embodies and fosters.

But more than mere *Denkstil*, more than aversion to the conceptualism of Continental law, underlies the American disinterest in comparative law, particularly procedural law. There is a practical difficulty in using comparative example across the gulf that divides Anglo-American from Continental procedure. The extreme interconnectedness of the various attributes of a legal procedural system make it quite difficult to borrow selectively. This difficulty is then reinforced in the United States through a powerful ideology of celebration. This ideology, which asserts the superiority of Anglo-American legal procedure, I have taken to calling "The Cult of the Common Law."

*Interconnectedness.* Legal procedures do not exist in the abstract.<sup>21</sup> A procedural system bears the most intimate relation to the institutions that operate the procedures. It is difficult to carry insights from Continental to Anglo-American procedure, because the different procedures presuppose different institutions. There is a deep relationship between *how* we proceed and *who* does the proceeding. This nexus between procedure and institutions materially complicates the task of those who would derive practical insight from the study of comparative procedure.

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20. The main official source, the Senate Report, makes no mention of comparative procedure or experience. U.S. Senate Judiciary Committee, Sentencing Reform Act of 1983, S. Rep. No. 98-223, 98th Cong., 1st Sess. (1983). For background on the events see Stith & Koh, "The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines," 28 *Wake Forest L. Rev.* 223 (1993).

21. I developed some of the points in the next paragraphs in Langbein, "The Influence of the German Emigres on American Law: The Curious Case of Civil and Criminal Procedure," in *Der Einfluß deutscher Emigranten auf die Rechtsentwicklung in den USA und in Deutschland* 321, 327-29 (1993).

Most borrowings would affect not only the rules, but the legal professionals who apply the rules. In the Continental civil procedural systems, it is the judges who take the major responsibility for the conduct of fact-gathering, and this responsibility comes—in Anglo-American terms—at the expense of the lawyers for the parties. Continental civil procedure is still an adversarial system, in the sense that the lawyers for the parties frame the issues that are in dispute and oversee the court's conduct of fact-gathering and fact-finding. This division of responsibility between the court and the lawyers leaves Continental judges more instrumental and influential than the judges who preside over party-dominated civil procedure in the United States. In the realm of criminal procedure the institutional contrasts are even stronger, because the principle of partisan fact-gathering that dominates the American system is so contrary to the Continental tradition of impartial pretrial investigation by an ostensibly neutral officer of the state (prototypically, the *juge d'instruction* in France and the *Staatsanwalt* in Germany).

Another way to express this idea is to say that, across the divide between the Anglo-American and Continental procedure, there is really no such thing as a small reform.

*Experts.* Take, for example, the most obvious of the European-inspired improvements that Americans could make in their civil procedure, the use of court-appointed expert witnesses. There is widespread dissatisfaction among American jurists about the perverse incentives that inhere in our system of party-selected and party-prepared experts. I have observed elsewhere that “the systematic incentive in our procedure to distort expertise leads to a systematic distrust and devaluation of expertise. Short of forbidding the use of experts altogether, we probably could not have designed a procedure better suited to minimize the influence of expertise.”<sup>22</sup>

In some sense the use of court-appointed experts is an idea so obvious that Americans should hardly have to sit at the feet of the Europeans to borrow it, and indeed, one can find indigenous American authority permitting the use of court-appointed experts.<sup>23</sup> But this American authority is virtual dead letter. Our trial judges have found themselves unable to make use of their theoretical power to summon court-appointed experts, because our trial courts lack the support elsewhere in our civil procedural system that they would need to make the power effective. Behind the relatively simple idea of using an impartial expert instead of a partisan there lies a web of ancillary manifestations of judicial power over the conduct of the liti-

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22. Langbein, “The German Advantage in Civil Procedure,” 52 *U. Chi. L. Rev.* 823, 836 (1985).

23. Federal Rules of Evidence, Rule 706; Uniform Rules of Evidence (Model Expert Testimony Act), Rule 706, 13 Uniform Laws Annotated 319.



gation. In Continental systems, it is the judge, not the litigant, who decides whether to call for expert advice, whom to choose, when to do it, how to formulate the issues on which expertise is being sought, and how to inform and instruct the expert about the facts to be consulted and the standards to be applied. "Effective use of court-appointed experts as exemplified in German practice presupposes early and extensive judicial involvement in shaping the whole of the proofs."<sup>24</sup> Because the American trial judge ordinarily has little or no familiarity with a lawsuit until it comes on for trial, he or she has no effective opportunity to know in advance of the trial that it might be useful to commission an expert, and hence no opportunity to locate and instruct the expert properly. Thus, we see that the ability to make regular and intelligent use of court-appointed expertise in Continental practice turns out to depend upon a host of other attributes of Continental procedure and institutions.

*Vested interests.* Again and again when one turns to examine topics of divergence between American and Continental procedure, one finds that the great structural peculiarities of the Anglo-American tradition operate as barriers to comparative law. The jury system and our system of party-dominated fact-gathering so define the character of our civil and criminal procedure that it has been hard to absorb insights from the jury-free Continental system, with its mechanisms for judicialized conduct of fact-gathering. Likewise, the Anglo-American constitutional tradition of resistance to specialized courts<sup>25</sup> has cut us off from the Franco-German tradition in administrative law.<sup>26</sup>

In conceding the importance of interconnectedness, I should not be taken to be advocating the status quo. I have made it clear in various places that I regard the virtues of Continental civil and criminal procedure to be so superior that I would favor undertaking the large-scale dislocations that would accompany a systemal transplantation. The present point is that systemal transplanting greatly increases the stakes, because it affects every vested interest in the legal system.<sup>27</sup>

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24. Langbein, *supra* n. 22, at 841.

25. Opposition to specialized courts remains intense. See, e.g., Richard A. Posner, *The Federal Courts: Crisis and Reform* 147-60 (1985).

26. French administrative law has attracted scholarly attention in England since Dicey at the end of the nineteenth century. Prominent works include L. Neville Brown & John S. Bell, *French Administrative Law* (1993); C.J. Hamson, *Executive Discretion and Judicial Control* (1954). I find it remarkable how little known this literature is among Americans interested in public and administrative law. German administrative law has had some attention lately, e.g., Rose-Ackerman, "American Administrative Law under Siege: Is Germany a Model?," 107 *Harv. L. Rev.* 1279 (1994).

27. For a pessimistic account of the prospects for renewed American attention to foreign example in civil procedure, see Stiefel & Maxeiner, "Civil Justice Reform in

*Ideology.* In the United States, the forces of the status quo in legal procedure enjoy the ideological reinforcement of the Cult of the Common Law. The Cult derives its primary force from the association of the ordinary law courts with the successes of the Anglo-American constitutional tradition. At crucial points in our history, especially in the seventeenth and eighteenth centuries, events in the ordinary courts contributed importantly to the development of limited government and civil liberties. I refer to institutions such as trial by jury, habeas corpus (that is, judicial review of arrest and detention), and judicial review of executive action.

The Cult of the Common Law is centered in that fusion of public and private law that seems so peculiar to persons trained in European legal systems. My suggestion is that the successes of Anglo-American public law have given an aura to our courts and our legal system that protects the system whenever criticism is directed toward the serious shortcomings in the procedures and institutions that handle routine matters of private law and criminal law. Implicit in the Cult of the Common Law is the contention that the legal system is an indivisible package—one ball of wax, to use the pleasant American image—and that any tampering with this complex structure risks the political liberties that have been historically associated with the Anglo-American legal systems. Expressed in this way, the Cult of the Common Law is profoundly chauvinistic and reactionary. It seizes upon the relatively precocious development of constitutionalism in the Anglo-American legal tradition, and uses that as a shield against criticism based upon foreign example. Again and again in discussions about the shortcomings of the contemporary legal system I find when I draw upon foreign example that I am met with responses such as, “Before you go on telling me any more about the virtues of German civil procedure, please explain why they had Hitler and we did not.”

American jurists are disinclined to interest themselves in foreign example for the same reason that scientists at American medical schools are disinclined to investigate the merits of medicine as it is practiced among the witch doctors of the Amazonian rain forest. They operate on the assumption that the foreigners have nothing to teach. But whereas the shortcomings of Amazonian medicine have been objectively verified, the disdain for Continental law rests upon a witch’s brew of ignorance, prejudice, and venality. Fortified in the lucrative fool’s paradise that they inhabit, American legal professionals have little incentive to open their eyes to the disturbing insights of comparative example.

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the United States—Opportunity for Learning from “Civilized” European Procedure Instead of Continued Isolation,” 42 *Am. J. Comp. L.* 147 (1994).